STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MERBAUM ASSOCIATES, INC. AND JOEL MERBAUM	:	DECISION DTA NOS. 816585 and 816586
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1988 through November 30, 1994.	:	

Petitioners Merbaum Associates, Inc. and Joel P. Merbaum, 115 Avalon Garden Drive, Nanuet, New York 10954, filed an exception to the determination of the Administrative Law Judge issued on September 23, 1999. Petitioners appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Andrew S. Haber, Esq., of counsel).

Petitioners filed a brief on exception and a reply brief. The Division of Taxation filed a brief in opposition. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioners were vendors pursuant to Tax Law § 1101(b)(8) and, therefore, persons required to collect sales tax under Tax Law § 1131(1) on the receipts from goods sold to various hotels and other customers.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

The Division of Taxation ("Division") issued to petitioner Merbaum Associates, Inc. a Notice of Determination, dated September 15, 1995, assessing sales taxes for the period December 1, 1988 through November 30, 1994 in the amount of $131,094.37 plus penalty and interest. A Notice of Determination, dated September 25, 1995, was issued to petitioner Joel Merbaum as a person responsible for taxes due from Merbaum Associates, Inc. The notice assessed tax of $131,094.37 plus penalty and interest.

An audit of Merbaum Associates, Inc. was triggered by information discovered in another audit. A Division auditor performing a sales tax audit of the Lake Placid Hilton Resort in Lake Placid, New York came across several invoices showing purchases of carpeting and chairs with no charge for sales tax. The invoices bore the name of Merbaum Associates, Inc., Georgetown Office Plaza, 339 North Main Street, New City, New York.

A review of the Division's records revealed that Merbaum Associates, Inc. was not registered as a sales tax vendor in New York State and did not file sales tax returns. A letter scheduling an audit appointment was mailed to Merbaum Associates, Inc. at the address shown on the sales invoice. This letter was returned to the auditor with notice from the United States Postal Service that it had no forwarding address for Merbaum Associates.

On April 13, 1994, the auditor, Mona Finn, visited the business address of Merbaum Associates, Inc. and learned that the company had been out of business for approximately six months and that its owner's name was Joel Merbaum.

On August 30, 1994, Ms. Finn sent a letter to Joel Merbaum at his home address scheduling an audit appointment on September 22, 1994. Ms. Finn visited Merbaum's home on that date and was told that he did not maintain the corporation's records and would try to get them from his accountant.

On November 1, 1994, the Division issued a subpoena for the sales records of Merbaum Associates, Inc., including: journals, ledgers, sales invoices, purchase invoices, Federal income tax returns, exemption certificates and shipping documents. Mr. Merbaum[1] was asked to produce these records at his home on November 9, 1994. Records were not produced at this time.

Since petitioner did not make any records available, the Division estimated the sales of Merbaum Associates, Inc. based upon Federal income tax returns (form 1040, schedule C) filed by petitioner for the years 1989 through 1991. In each of those years, Merbaum filed a schedule C reporting profits from doing business as follows:

Year	Gross Receipts	Cost of Goods Sold	Gross Profit	Expenses	Net Profit
1989	$ 405,622.00	$ 334,782.00	$70,840.00	--------	$ 17,282.00
1990	79,371.00	64,105.00	15,266.00	$10,653.00	4,613.00
1991	262,274.00	213,354.00	48,774.00	40,411.00	8,363.00

Because no other records were available, the Division assumed that gross receipts as shown on the schedule C's were taxable sales made in New York State, and sales tax due was calculated accordingly. Gross receipts for 1992, 1993 and 1994 were estimated to be the same as

[1] The evidence will show that Merbaum Associates, Inc. conducted business for only one of the six years in the audit period. During the remainder of the period, Joel Merbaum conducted business as a sole proprietor. Inasmuch as the majority of the evidence pertains to Joel Merbaum personally, he will be referred to in the remainder of this determination as the "petitioner" or as "Merbaum."

those reported for 1991, $262,274.00 per year. Annual gross receipts were allocated to sales tax quarters for each of the years in the audit period, and the Rockland County sales tax rate was then applied to gross receipts to determine sales tax due.[2] This resulted in tax due of $11,825.56 per quarter for the period December 1, 1988 through November 30, 1989; tax due of $2,261.00 per quarter for the period December 1, 1989 through November 30, 1990; tax due of $4,098.03 per quarter for the period December 1, 1990 through February 28, 1991; tax due of $4,425.87 per quarter for the period March 1, 1991 through August 31, 1991; and tax due of $4,753.72 per quarter for the period September 1, 1991 through November 30, 1994. Total sales tax due was determined to be $131,094.34.

The Division issued a Statement of Audit Changes to Merbaum Associates, Inc., dated December 5, 1994 asserting sales tax due as computed above. Petitioner returned a copy of the statement to the Division with the following message written on it: "As we discussed I was just a salesman and don't understand the above. Can we meet at my Accountant's office so to clarify this."

As requested the auditor contacted petitioner's accountant to schedule an appointment, and a meeting was scheduled on June 6, 1995. On May 23, 1995, the auditor mailed an audit appointment letter to the accountant confirming the date of the meeting and requesting that records of taxable sales be made available at that time.

A meeting was held as scheduled. The auditor, Merbaum, and his accountant, Mel Steir, were present. No books or records were made available to the auditor. They discussed what records would be needed to bring about an adjustment to the Statement of Proposed Audit

[2] The tax rate changed from 6.25% to 6.75% as of March 1, 1991 and to 7.25% as of September 1, 1991.

Changes, and a second appointment was scheduled for June 29, 1995. At the request of Mr. Steir, this appointment was postponed to July 18, 1995. On July 17, 1995, Mr. Steir telephoned the auditor and canceled that appointment. Notices of determination were then issued as described above.

Petitioner was a sales representative for five different manufacturers of furniture and carpeting. Among the companies he represented were American of Martinsville, Virginia, American Premiere Furnishings in Axton, Virgina and Value Line Company of Arkadelphia, Arkansas. His territory included Pennsylvania, New Jersey, New York, Connecticut, Vermont, New Hampshire and Maine.

Petitioner never provided copies of contractual agreements with the companies he represented. The only evidence he offered of a typical agreement was a letter to him from Value Line, dated January 8, 1991. The first paragraph of that letter confirms that petitioner was appointed as Value Line's sales representative in eight states. The second paragraph states:

> You will be paid a 12% commission upon our delivery to jobsite. At times we will request you to collect funds for us to expedite fast track orders. After payments are received, we will pay commission on the following 10th of the next month.

After getting a lead from one of the manufacturers, petitioner would visit a potential customer and solicit an order. If the customer placed an order, petitioner wrote it up on a Merbaum Associates sales invoice. Petitioner then placed the order with the manufacturer. After receiving an order, the manufacturers billed the customer directly. Petitioner did not receive his commission until the manufacturer was paid in full.

As a manufacturer's representative, petitioner facilitated relationships between the manufacturer and the customer. He was responsible for collection of monies, replacing or repairing broken furnishings, monitoring deliveries and negotiating with common carriers.

Merbaum Associates was incorporated in March 1991. Until that time, petitioner did business as a sole proprietor. Merbaum Associates actively transacted business for approximately one year, after which petitioner again conducted business as a sole proprietor.

Petitioner submitted four Value Line Company sales invoices showing sales made to customers in 1997, 1998 and 1999. The customers were all located outside of New York State. In each case, petitioner is shown as the salesman.

Petitioner filed a Chapter 7 petition in bankruptcy in the United States Bankruptcy Court, Southern District of New York on February 3, 1995. On or about July 17, 1995, the petition was amended to include the New York State Department of Taxation and Finance in the schedule of unsecured priority creditors.

The Division issued conciliation orders, dated April 10, 1998, to petitioner and Merbaum Associates, Inc. sustaining the notices of determination.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In the determination, the Administrative Law Judge rejected petitioner's contention that he could not be held liable for taxes assessed against him as a corporate officer since the corporation was in existence for only one year and petitioner conducted business as a sole proprietor during most of the audit period. The Administrative Law Judge concluded that although petitioner received a notice issued to him as a responsible officer rather than as a sole proprietor, the notice was not invalid absent evidence of harm or prejudice to petitioner.

The Administrative Law Judge concluded that petitioner knew that he was being assessed for sales made by Merbaum Associates or by him personally and he effectively responded to the notices of determination issued. Petitioner was provided with statements of proposed audit adjustment and he met personally with the auditor on two occasions. Petitioner had a conciliation conference and filed timely petitions for a hearing. Thus, the Administrative Law Judge concluded that there was no evidence in the record to indicate that petitioner was prejudiced by the error in the Notice of Determination issued to him personally.

The Administrative Law Judge noted that pursuant to Tax Law § 1131(1), persons responsible for collection of sales tax include every vendor of tangible personal property. A "vendor" is defined as "[a] person making sales of tangible personal property or services, the receipts from which are taxed by [article 28]" (Tax Law § 1101[a][8]). The Administrative Law Judge rejected petitioner's argument that he was a commissioned sales representative and not a vendor of tangible personal property. Section 526.10(a)(1)(i) of the Division's regulations provides that an independent manufacturer's representative, representing many clients and acting on his own behalf, who solicits orders from New York State customers is a vendor. Thus, the Administrative Law Judge concluded that petitioner was a vendor and personally liable for the sales tax imposed, collected or required to be collected under Article 28. The Administrative Law Judge stated that the liability of a manufacturer's representative is separate and independent from that of the manufacturer and the customer, each of whom is also independently liable for the tax imposed.

The Administrative Law Judge found that petitioner never offered any records of sales made during the audit period, either at the time of the audit or in the course of his administrative

hearing. Relying on prior decisions of the Tax Appeals Tribunal and the Appellate Division of the New York State Supreme Court, the Administrative Law Judge stated that where a petitioner's books and records are unavailable, the Division is authorized to calculate sales tax due using any reasonable method. The Administrative Law Judge noted that an estimate of taxable sales based on Federal income tax returns filed by petitioner has been found to be reasonable where no other information is available. Additionally, the Administrative Law Judge also stated that it is petitioner's burden to show by clear and convincing evidence that the Division's methodology was unreasonable or that the amount of tax assessed was erroneous. The Administrative Law Judge concluded that petitioner failed to meet his burden of proof.

The Administrative Law Judge further concluded that petitioner did not establish that he had been discharged from liability for the taxes due as a result of having filed a petition in bankruptcy.

The Administrative Law Judge noted that sales tax penalties may only be canceled if the failure to pay is due to reasonable cause and not due to willful neglect. The Administrative Law Judge found that petitioner's failure to make a good faith effort to ascertain his responsibilities as a vendor and his failure to present any evidence of the amount of his taxable sales precluded a finding of reasonable cause.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that he is a wholesale sales representative selling contract guestroom furniture to hotels and he is not a vendor. He claims that the manufacturers with whom he placed his orders collected sales tax from their customers or obtained a tax exempt certificate for capital improvements where applicable. Further, petitioner argues that the

conclusion that all orders written during the audit period are New York State taxable sales is totally incorrect. There is no allowance for the fact that he had a five-state sales territory.

In opposition, the Division argues that the Administrative Law Judge's determination was correct and should be affirmed.

OPINION

A presumption of correctness attaches to a properly issued statutory notice (***see, Matter of Atlantic & Hudson Ltd. Partnership***, Tax Appeals Tribunal, January 30, 1992). Once a Notice of Determination was issued to petitioner, petitioner bore the burden of proof to demonstrate that the basis for the assessment was unreasonable or that the amount of tax assessed was incorrect (***Matter of Micheli Contr. Corp. v. New York State Tax Commn.***, 109 AD2d 957, 486 NYS2d 448). However, petitioner introduced no evidence which would support either the unreasonableness of the assessment or the incorrectness of the tax assessed. Therefore, petitioner was deemed to have submitted to the presumption of correctness.

Petitioner's activity falls squarely within the parameters of 20 NYCRR 526.10(a)(1)(i) categorizing him as a vendor. As the Administrative Law Judge noted, the manufacturers with whom petitioner placed his orders might also be charged with the collection of sales and use tax as vendors (***see***, 20 NYCRR 526.10[a][3] and 526.10[a][4][i], [ii]; ***see also***, ***Matter of Ohio Table Pad Co.***, Tax Appeals Tribunal, April 22, 1999). However, that does not relieve petitioner of his separate and independent liability therefor (Tax Law § 1133[a]). Without adequate books and records, the Division was forced to estimate the sales activity of petitioner during the audit period (***Matter of Urban Liqs. v. State Tax Commn.***, 90 AD2d 576, 456 NYS2d 138). Thus, there is no basis in the record for disturbing the conclusion of the Administrative Law Judge that

the method of estimation of tax due was reasonable. Petitioner introduced no evidence to demonstrate that the Division was attempting to assess tax on sales for which tax had already been collected and paid.

We find that the Administrative Law Judge completely and adequately addressed the issues presented and see no reason to modify them in any respect. As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Merbaum Associates, Inc. and Joel Merbaum is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Merbaum Associates, Inc. and Joel Merbaum is denied; and

4. The notices of determination dated September 15, 1995 are sustained.

DATED: Troy, New York
August 17, 2000

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner